IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 660 of 1998

with

CRIMINAL REVISION APPLICATION No 400 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

IQBALGANI @ ABDULGANI VOHRA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 660 of 1998
   MR HM PARIKH for Petitioners No. 1-4
   MR KT DAVE,APP for Respondent No. 1
2. Criminal Revision Application No. 400 of 1998
   MR KT DAVE,APP for Petitioner No. 1
   RULE SERVED for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 26/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. All the four appellants were charged for offence punishable under section 376 of IPC for committing rape on a mentally retarded girl Bhavna on 6.6.1994 between 1.00 and 2.00 a.m. At the end of the trial of Sessions Case No. 177 of 1995, the learned trial judge, by his judgment and order dated 10.6.1998, convicted all the appellants for offence punishable under section 376 read with 114 and under section 376 of IPC and sentenced them to suffer R.I. for ten years and to pay a fine of Rs. 3000/-, in default, to undergo further R.I. for two years. All the appellants were also directed to pay Rs. 20,000/- each by way of compensation to the victim, within two months from the date of judgment. The learned trial judge also directed the State Government to deposit Rs. 25000/- within two months from the date of the judgment by way of compensation to the prosecutrix and on such amount being deposited, the trial court directed the same to be invested in any nationalised bank or in any Government security. Santram Mandir Trust was directed to administer the said security and to pay the amount of interest to the prosecutrix. In the event of death of the prosecutrix, it was directed that the Government shall forfeit the entire amount and the said amount shall be utilised for mentally retarded children.

The State Government has filed revision application being Criminal Revision Application No. 400 of 1998 challenging the order of the learned judge directing the State Government to deposit Rs. 25000/-.

2. This Court, while admitting the appeal preferred by the appellants, on 9.10.1998, refused bail to the appellants. However, the proceedings if any initiated by the Government for recovery of the compensation amount ordered by the learned trial judge against each of the accused of Rs.20,000/- each was stayed.

Similarly, in revision application being Criminal Revision Application No. 400 of 1998 preferred by the State of Gujarat, this Court, on 9.10.1998 issued Rule and granted ad-interim stay as prayed for in terms of para 6(a) and directed the Criminal Revision Application to be heard along with Criminal Appeal No.660 of 1998.

In para 6(a) of the revision application, operation and execution of the order directing to pay compensation of Rs. 25000/- to the victim Bhavna was prayed for.

In substance, this Court had stayed the compensation to be paid by the appellants as well as State Government to victim Bhavnaben.

3. The complainant Ichhaben Ex. 8 is the mother of Bhavnaben. According to her, she is residing in Kathlal town. Her daughter Bhavna is one of her four daughters. According to her, Bhavna is insane and mentally retarded. She is not able to speak properly. According to her, the incident had taken place four years prior to her deposition when all her family members were sleeping outside the house on cot as it was a summer night. On being awakened because of the noise, she saw Bhavna bleeding from nose as well as private parts. Her clothes were stained with blood. In the morning, she noticed blood on the cot. As she did not see anybody at night, she did not discuss the issue with anybody. Two days thereafter, i.e. on Sunday, again she woke up at night and did not find her daughter Bhavna on the cot. She, therefore, shouted for her. Thereafter, she saw her daughter Bhavna coming out of the house of A/1 Lalia. She also saw A/1 near her house. She also saw the clothes of Bhavna stained with blood. She thereafter saw all the four accused at a distance of 25 to 30 feet from her house with the help of lamp post stationed near her house. She further stated that her daughter Bhavna is neither able to speak nor able to understand anything. On the next day i.e. on Monday, she had gone to the police station for the purpose of filing complaint. As the police had done nothing in the matter, she had gone to the Inspector General of Police and in the meantime also, filed two complaints before the police. After about three months, police recorded her complaint.

In her cross examination, she has remained consistent with her earlier version given in her examination-in-chief. She has stated that the house of A/1 is near her house. She has also admitted that her relations with the mother of A/1 are not cordial and frequent quarrels take place between them on the ground that the A/1 being a non-vegetarian, used to throw bones around her house. She has admitted that A/2 is residing at some distance from her house while A/3 is residing behind PTC College and A/4 is residing near bus stand. While showing ignorance about the four accused doing labour work, she has stated that all the appellants are the friends and they gather at the house of A/1. She has

denied the suggestion that she did not see the appellants on the night in question. She has also denied the suggestion that on the night in question, her daughter was in period and that she did not care to change the clothes. On being asked about why she filed the complaint after three months, she replied that as the police did not record complaint, she had to move further. She had been contradicted with her earlier version, namely that she has not stated in her earlier statement that she woke up on hearing the sound and saw the blood oozing out from the nose of her daughter. She is also contradicted with her earlier version as to the incident having taken place at the house of mother of A/1. She has admitted that she had not stated in the complaint that she saw her daughter coming out from the house of A/1 when she woke up from the sleep and she did not see her daughter on the cot. Except the aforesaid minor contradictions, she has remained consistent about the allegations made by her against the appellants. She has specifically raised her fingers at the four appellants by stating that all the four appellants were standing at a distance of 25 to 30 feet after her daughter returned in a bleeding condition on the night in question.

4. Dr. Paresh Patel, PW 3 Ex. 12 at the relevant time was serving as Medical Officer, Kathlal Community Health Center. He had examined Bhavna on 28.9.1994 who had come with a police yadi Ex. 30. In his evidence, he has stated that Bhavna was aged 25 years and was mentally retarded and was not able to speak and understand anything. He, therefore, took the history from the mother of the victim. According to him, the mother of the victim informed him that on 6.6.1994, her daughter Bhavna was raped. After examining Bhavna, he recorded a conclusion that rape was committed on her. He has not stated about the timing of the rape.He found that the hymen of the victim was not in tact. He did not notice either internal or external injury on the person of the victim. He, however, stated that the victim was not habituated to sexual intercourse. He has given medical certificate Ex. 14.

5. Mr. Parikh, learned Counsel for the appellants submitted that in the instant case, the prosecution has failed to establish involvement of the appellants in the alleged offence of committing rape. In the submission of Mr. Parikh, even if the evidence of the complainant is accepted, the factum of appellants having committed rape is not established. He has further submitted that the evidence of the complainant is required to be rejected on the short ground that she involved the appellants after

lapse of three months. Mr. Parikh, by inviting our attention to the medical certificate Ex. 14 issued by Dr. Patel, submitted that the rape is not committed on the victim. He, therefore, submitted that the learned trial judge has committed an error in convicting the appellants for the offence punishable under section 376 of IPC.

6. Mr. K.T.Dave, learned APP, on the other hand, supported the judgment of the trial court in toto.

7. After considering the evidence on record, we are clearly of the opinion that the prosecution in the instant case has clearly established the charge levelled against the appellants. From the evidence of the complainant, it is clear that the complainant did not see her daughter Bhavna on the night in question and when she saw her, she was profusely bleeding. She has further stated that the girl was coming out of the house of A/1. The presence of all the appellants is established from the evidence of the complainant. She knows all the accused and according to her, they all are friends and they used to meet at the house of A/1. Apart from this incident, she also did not see her daughter on the cot two days prior to the incident. True, at that time, she did not notice the presence of any of the accused. If the aforesaid version of the complainant is accepted, it is clear that the victim was not there on the cot when the complainant woke up from sleep during night hours. It is also clear that the victim came from the house of A/1 when complainant shouted for her and that the complainant saw all the appellants at the distance of about 25 to 30 feet. We should not lose sight of the fact that the victim is a mentally retarded girl. She neither speaks nor understands the act having been committed on her. In the instant case, it is true that there is no direct evidence involving all the appellants in committing rape on the victim Bhavna. However, the circumstances, in the instant case, established by the prosecution, in our opinion, are sufficient to hold that the appellants, taking advantage of the mental condition of the victim,committed sexual intercourse.

The complainant has sufficiently explained the socalled delay in filing complaint after three months by stating that initially, police did not record the complaint, but lateron, the complaint was registered when she moved highest authority. It will be too much for the complainant to involve appellants by falsely involving her own daughter having become victim of sexual act committed by the appellants. We, therefore, see no merit in the submission of late filing of complaint.

8. The evidence of Dr. Paresh Patel is required to be read in toto. We have to bear in mind the fact that Dr.Patel examined the victim after about three months. Therefore, it is obvious that he could not have found any external or internal injury. As the victim was not able to understand anything about the sexual intercourse because of her mental condition, she was not able to resist the sexual act committed on her. Dr. Patel, in his evidence, has clearly answered the question by stating that one may not find either external or internal injuries in cases of rape. In light of the above, even if Dr. Patel has stated in his evidence that there was no evidence of rape, we have to appreciate the evidence of Dr. Patel wherein he has also stated that hymen of the victim was ruptured and that she was not virgin. The evidence of Dr. Patel, in our opinion, on the contrary helps the prosecution rather than the defence. We, therefore, hold that the evidence of the complainant is totally corroborated by the medical evidence. In the circumstances, in our opinion, the trial court was justified in convicting all the appellants for the offence of rape. Since we are in agreement with the reasonings of the learned trial judge, we do hold that the appellants are guilty of committing offence punishable under section 376 of the IPC by committing rape on victim Bhavna on the night of 6.6.1994. We accordingly confirm the conviction recorded against each of the appellants by the learned trial judge.

9. Mr. Parikh, learned Counsel for the appellants, however, submitted that all the appellants are young and the only bread earners of their respective families and by this time, they have already undergone about four years of imprisonment and, therefore, lenient view be taken in the matter. We could have straight away rejected this contention on the ground that the victim being mentally retarded girl, the appellants committed rape taking advantage of the situation. However, the victim is now no more and has in fact expired on 15.9.1999 as can be seen from the death certificate produced by the learned APP on the record of the case. It may also be stated that even the appellant no. 2 Chandubhai Regabhai Vanjara has also expired on 10.1.2000 while under treatment of TB as can be seen from the letter dated 14.3.2002 addressed by the Superintendent of District Jail, Jamnagar, addressed to the learned APP. These circumstances, in our opinion, are sufficient to show some leniency to the appellants. Thus, instead of awarding imprisonment, if the fine is imposed and the same is ordered to be paid to the complainant, we feel

that the ends of justice shall meet.

10. In the result, the following order is passed.

Criminal Appeal preferred by appellant no.2Chandubhai Regabhai Vanjara abates on account of his death.

Criminal Appeal preferred by appellants no. 1, 3 and 4 is partly allowed. All the appellants are convicted for offence punishable under section 376 read with section 114 of the IPC and they are sentenced to suffer R.I. for four years and to pay a fine of Rs. 5000/- each, in default, to undergo further R.I. for two years. The amount of fine, if realised, to be paid to the complainant Ichhaben Prabhudas Bhatt, residing Near Railway Crossing, Kathlal, District: Nadiad, by account payee cheque after proper verification.

Accordingly, the judgment and order of the trial court as far as conviction is concerned, is confirmed. However, the sentence imposed by the trial court and other directions are modified to the aforesaid extent.

With the aforesaid directions, we allow Criminal Revision Application No. 400 of 1998 preferred by the State of Gujarat and set aside the direction issued by the learned trial judge in the impugned judgment.

Order accordingly.

(Kshitij R.Vyas,J.)

(Ravi R.Tripathi,J.)

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